IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-940

CONSUMER FEDERATION OF AMERICA, *et al.*,
Petitioners,

v.

EARL L. BUTZ, Secretary, Department of Agriculture, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF THE CONSUMERS' PETITION FOR CERTIORARI

Eight Consumer Groups[1] have petitioned this Court to correct the Eighth Circuit's clear error in holding that the Consumers' failure to file a cross-appeal from a favorable District Court decision prevented the appellate court from considering the merits of the Consumers' arguments urging affirmance. Respondents apparently concede that an error

[1] The eight Consumer Groups are the Consumer Federation of America, National Consumers League, Americans for Democratic Action – Consumer Affairs Committee, National Consumers Congress, Public Citizen, Amalgamated Meat Cutter and Butcher Workmen of North America (AFL-CIO), Service Employees International Union (AFL-CIO), and American Federation of Teachers (AFL-CIO).

was made (D.Br. 6),[2] but nonetheless argue that this Court should deny review because, in respondents' opinion, the Consumers' arguments would not have changed the outcome. (*Id.*). As the Consumers' demonstrate below, however, their arguments are very likely to be outcome-determinative, but more importantly, in order to accede to respondents' wishes, this Court would not only have to disregard the Eighth Circuit's error, but would have to go beyond the issues presented in the certiorari papers and reject the Consumers' claims on the merits. Since that kind of determination should only be made on plenary review, a remand to the Eighth Circuit is appropriate.

Review in the first instance by the Court of Appeals is especially important here because the Consumers' claims could be rejected on the merits only if a reviewing court were to take the extraordinary step of setting aside a finding of fact made by the District Court on the basis of the *administrative record.*[3] The standard for rejecting such a finding is a very strict one, which this Court could not be expected to apply on the basis of the certiorari papers alone. When findings of fact are based on

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[2] "D.Br." refers to designated pages of the Memorandum For The Respondents In Opposition. "Pet." refers to designated pages of the Consumers' Petition for Certiorari and Suggestion for Summary Reversal.

[3] Respondents have misrepresented the Consumers' position as a garden variety challenge to a substantial evidence finding made by the District Court. In reality, however, the Consumers seek to *uphold* the District Court's decision, relying on a specific finding that the administrative record contains no evidence whatsoever to establish that a necessary statutory condition has been met. As shown below, this finding establishes that the subject regulations exceed the Secretary's authority.

testimonial evidence, they cannot be set aside unless "clearly erroneous." (Fed.R.Civ.P. 52(a)). Likewise, where, as here, review of a voluminous record is involved, a reviewing court would have to carefully evaluate, weigh, and counter-balance all of the evidence underlying the District Court's finding in order to set it aside. That is not a job for this Court, but rather is the obligation of the Court of Appeals after careful examination of the extensive administrative record, aided by briefs and oral arguments from the parties. Here, it is undisputed that the Eighth Circuit did not meet its obligation. (D.Br. 6). Therefore, a remand with instructions to fully consider the Consumers' claims is the proper remedy.

Once the merits of the Consumers' claims are considered, it is unlikely that the Secretary's new regulations can be sustained. Section 203(b) of the Agricultural Marketing Act, 7 U.S.C. § 1622(b), prohibits the Department of Agriculture from implementing any regulations which would increase the price spread between cattlemen and consumers. Yet, as Consumers have argued, and the District Court has held (Pet. A.15), the challenged regulations will have precisely this effect by increasing the profits of cattlemen at the expense of consumers, who will be forced to pay higher retail prices for beef. In fact, this is exactly what happened in 1965 when the regulations were last changed, and comments placed in the administrative record by one of the Secretary's own experts indicate that this is likely to occur again under the new regulations. (Exhibit 815, Comment No. 2661). All parties agree that the cattlemen's production costs will be lowered under the new regulations, but respondents argued in the District Court that this would not increase the price spread because prices would also drop

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at the retail level. (*See* D.Br. 7-8). After careful consideration, however, the District Court rejected that contention, finding that "*/t/here is, however, no evidence in the administrative record indicating a factual basis for the Department's conclusion that prices would drop at the retail level.*" (Finding No. 16; Pet. A.15; emphasis in original).[4] Since the administrative record is devoid of evidence which would allow that finding to be set aside, the Consumers argued that the Court of Appeals was compelled to affirm the District Court decision. This is the argument that the Court of Appeals erroneously refused to consider. As a result, the new regulations were allowed to take effect even though they exceed the Secretary's statutory authorization in this important respect.

The Consumers have established, and respondents have apparently conceded, that the Eighth Circuit erred in holding that it could not even consider the Consumers' arguments for affirmance of the District Court opinion because Consumers, who prevailed in the District Court, had not filed a cross-appeal. Correction of this serious error is necessary both to allow Consumers their day in court, and to enable proper resolution of this controversy.

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[4] It is important to note that this finding was based on the administrative record, not on testimony taken at trial in the District Court which the Court of Appeals found to have been unauthorized.

Therefore, it is respectfully submitted that certiorari should be granted and the case should be summarily remanded.

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